

PUBLIC MEETING MINUTES

June 14, 2012

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:00 a.m.

Members Present

Anita I. Martinez, Chair
Alice Dowdin Calvillo, Member
A. Eugene Huguenin, Member

Staff Present

Wendi L. Ross, Deputy General Counsel
Les Chisholm, Division Chief, Office of General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer (Excused)

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the April 12, 2012 Public Meeting. She reported that the Board met in continuous closed session to deliberate the pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in April. Those were PERB Decision Nos. 2231a-M, 2236a-M, 2249-M, 2250-S, 2251-M, 2252-M, 2253-H, 2254-H, 2255-H, 2256, 2257-H, 2258-M, 2259, 2260, 2261-M, 2262, 2263-M, 2264, 2265, 2266, 2267-M, 2268, 2269, 2270, 2271-M, and 2272-M, and PERB Order No. Ad-394. In Request for Injunctive Relief (IR Request) No. 618 (*Melvin Jones Jr. v. County of Santa Clara*), the request was denied, IR Request No. 619 (*Public Employees Union Local 1 v. City of Yuba City*), the request was withdrawn, IR Request No. 620 (*Melvin Jones Jr. v. County of Santa Clara*), the request was denied, and in IR Request No. 621 (*Wenjiu Liu v. Trustees of the California State University (East Bay)*), the request was denied. A document containing a listing of the aforementioned decisions was made available at the meeting. A list containing the decisions is available on PERB's website.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo, to close the April 12, 2012 Public Meeting.

Ayes: Martinez, Dowdin Calvillo and Huguenin.

Motion Adopted – 3 to 0.

Without objection, Chair Martinez adjourned the April 12, 2012 Public Meeting. She then opened and called to order the June 14, 2012 Public Meeting. Member Dowdin Calvillo led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin, that the Board adopt the minutes for the April 12, 2012 Public Meeting.

Ayes: Martinez, Dowdin Calvillo and Huguenin.

Motion Adopted – 3 to 0.

Comments From Public Participants

Wenjiu Liu, an Assistant Professor of Finance at the California State University, East Bay, appeared before the Board. Mr. Liu stated that prior to his recent filings with the Board, he was unfamiliar with PERB and its processes. He expressed respect and appreciation for the handling of his cases by PERB staff, including an unfair practice charge and a request for injunctive relief. Mr. Liu provided background regarding both his employment experiences at the university and the resultant filings at PERB. He expressed extensive suffering and grief from retaliation by the university which culminated in his denial of tenure and promotion, among other things, and ultimately in his termination. Mr. Liu stated that he filed the request for injunctive relief with PERB in hopes of an expedient resolution to this matter. He stated his belief that a decision by PERB in 2-3 years of his unfair practice charge would cause irreparable harm to his career and ability to research.

As a Board agent who might possibly preside over the unfair practice charge filed by Mr. Liu, Chief Administrative Law Judge Shawn Cloughesy physically removed himself from the Public Meeting during Mr. Liu's appearance before the Board.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

a. Administrative Report

In Chief Administrative Officer Eileen Potter's absence, Chair Martinez reported that the Administrative Services Division is in the process of completing Fiscal Year 2011-2012 expenditures and projects by staff, Stephanie Gustin and Ben Damian.

Chair Martinez reported on the progress of the lease renewals in PERB's Oakland and Sacramento offices. Tenant improvements and designs for floor plans have been approved by PERB for both offices. She stated that PERB's overall expense for rent in the Oakland office will not increase with the acquisition of additional space for a witness and hearing room. The anticipated completion of the improvements in that office is September 2012. With contract bids received, the lease renewal of PERB's Sacramento office is at the

Department of General Services for review and finalization. Tenant improvements in that office have not yet been scheduled, but it is anticipated that such work will be performed after hours to avoid interruption to PERB business.

Chair Martinez concluded by reporting on the budget. She stated that PERB's 2012-2013 budget remains as submitted which includes the transfer of State Mediation and Conciliation Service from the Department of Industrial Relations to PERB.

b. Legal Reports

Wendi Ross, Deputy General Counsel, reported that the monthly activity and litigation reports had been distributed to the Board for its review. From those reports Ms. Ross recapped the following information since the Board's last Public Meeting in April. With respect to unfair practice charges during the months of April and May, 200 new cases were filed with the General Counsel's Office (an increase of 8 over the prior two-month period and by 45 over the two-month period prior to that); 203 case investigations were completed, and during the same period a total of 61 informal settlement conferences were conducted by staff (down by 4 over the prior, but up by 6 over the two month period prior to that).

Ms. Ross stated that fiscal year end data would be reported at the PERB's Public Meeting in August. However, as compared to Fiscal Year 2011-2012, it is significantly clear that the General Counsel's office was experiencing a significant increase in the number of charge filings (an increase of 9 percent), requests for injunctive relief (an increase of 37 percent), mediation requests (38 percent increase), and factfinding requests (16 percent increase). Ms. Ross reported that the amount of time General Counsel staff has spent on litigation matters has also taken a leap from last year. She continued, as mentioned by the Chair, since the last Public Meeting in April, the Board issued determinations in four requests for injunctive relief:

1. *Jones v. County of Santa Clara*, IR Request No. 618. The Board denied the request on April 30, 2012.
2. *Public Employees Union #1 v. City of Yuba City*, IR Request No. 619. This request was withdrawn on May 2, 2012. The matter was settled during a voluntary pre-complaint conference convened by PERB's Office of General Counsel staff on May 4, 2012, and the unfair practice charge was withdrawn on June 6, 2012.
3. *Jones v. County of Santa Clara*, IR Request No. 620. The Board denied the request on May 14, 2012.
4. *Liu v. Trustees of California State University (East Bay)*, IR Request No. 621. The Board denied the request on June 5, 2012.

In terms of litigation relating to PERB, since the April Public Meeting, three new litigation matters were filed:

1. *Moore v. PERB; Housing Authority of the County of Los Angeles & AFSCME, Council 36*, California Court of Appeal, Second Appellate District. This case has since been dismissed by the Court.

2. *Grace v. PERB; Beaumont Teachers Association & Beaumont Unified School District*, California Court of Appeal, Fourth Appellate District, Division Two. Contact has been made with counsel as PERB believes that this matter should have been filed in Superior Court under the rule of the California Supreme Court's decision in the *Richmond Firefighters* case, and is subject to dismissal.
3. *City of San Diego v. PERB; San Diego Municipal Employees Association*, California Court of Appeal, Fourth Appellate District. In its new writ petition, the city essentially seeks a permanent injunction against any further administrative action on the association's charge.

Chief Administrative Law Judge Shawn Cloughesy reported on the activities of the Division of Administrative Law and stated that the ALJ report had been distributed to the Board for its review. He reported that hearings are continuing to be set within three months from the date of informal conference in all three offices, a trend that he anticipated keeping. Within the division, as compared to one year ago, proposed decisions written are up 81 percent and total cases closed are up 74 percent. With regard to total cases closed, Chief ALJ Cloughesy reported that the division had already passed the highest number for cases closed by 50 percent (at the end of May the division had 172 cases closed compared to 114 two years ago; that is since the MMBA came into PERB jurisdiction). Additionally, the division is approaching the highest number of proposed decisions issued since PERB acquired the MMBA. In conclusion, Chief ALJ Cloughesy reported that the number of proposed decisions appealed to the Board itself is under 30 percent, and below historic averages.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, reported that the Legislative Report was circulated to the Board for its review. He stated that written reports are currently being provided regularly to the Board regarding the status of pending legislation. With regard to legislation, Mr. Chisholm reported the following:

Assembly Bill 1466 (Committee on Budget) – Although not yet included in the written report circulated to the Board, Mr. Chisholm stated that this bill was amended to be a budget trailer bill and includes the various statutory changes that are associated with transferring the State Mediation and Conciliation Service from the Department of Industrial Relations to PERB. The bill was to be heard today.

Assembly Bill 1244 (Chesbro) – With respect to self-determination support workers, this bill creates collective bargaining rights and an additional jurisdiction for PERB. After a period of long inactivity, the bill is currently scheduled for hearing in the Senate Human Services Committee on June 26.

Assembly Bill 1606 (Perea) – There has been no change in status regarding this legislation. This bill is a proposal to amend further the language of section 3505.4(a) and relates to Assembly Bill 646, factfinding under the MMBA. The bill is pending action in the Senate Appropriations Committee.

Assembly Bill 1659 (Butler) – Amends the language that presently excludes both the City of Los Angeles and the County of Los Angeles from the jurisdiction of PERB with respect to unfair practice charges and provides that they are excluded from PERB jurisdiction only if they meet the standards for independence that are described in this legislation. The bill was approved in the Senate Public Employment & Retirement Committee on Monday on a 3-2 vote. The bill was previously approved in the Assembly and is not going to Appropriations, and currently awaits a final vote on the floor of the Senate.

In answer to a question by Member Dowdin Cavillo, Mr. Chisholm stated that Assembly Bill 1659 was sponsored by the American Federation of State, County and Municipal Employees, Council 36. The Board continued and had further discussion regarding this legislation.

Governor's Reorganization Plan 2 (Achadjian) – Subject of hearings and a special committee of the Assembly on June 6-7 and 13.

Senate Bill 252 (Vargas) – Provides for a separation of bargaining unit 7, upon a petition, into two units. This bill is scheduled for hearing on June 20 in the Assembly Committee on Public Employees, Retirement and Social Security.

Senate Bill 259 (Hancock) – Amends the definition of employee under the Higher Education Employer-Employee Relations Act to remove the balancing test for student employees. This bill is scheduled for hearing next week in the Assembly Committee on Higher Education.

Mr. Chisholm reported that this year's maintenance of the codes bill which includes changes to one or more PERB statutes is in the Assembly Judiciary Committee and will be heard on June 19.

AB 2381 (Hernández, Roger) – Brings employees of the Judicial Council, including employees of the Administrative Office of the Courts, under the Ralph C. Dills Act and requires that PERB not include Judicial Council employees in a bargaining unit that includes other employees. The bill is currently in Senate Rules awaiting committee assignment.

Mr. Chisholm concluded his report on legislation which had not yet been introduced regarding in-home support service workers. He reported that this legislation could come in the form of budget trailer language and would provide that the state, rather than individual counties or public authorities, would bargain on behalf of in-home support service workers. As such workers are currently under PERB, this legislation would not be an increase to the agency's jurisdiction.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo that the Legal (including General Counsel and Chief Administrative Law Judge), Administrative, and Legislative Reports be accepted and filed.

Ayes: Martinez, Dowdin Calvillo and Huguenin.

Motion Adopted – 3 to 0.

Public Hearing on Proposed Rulemaking

Chair Martinez opened the hearing on proposed rulemaking for consideration of changes and additions to regulations (California Code of Regulations, Title 8, amending sections 32380, 32603, and 32604, and adding sections 32802 and 32804), implementing factfinding procedures under the Meyers-Milias-Brown Act pursuant to the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011). She directed PERB's Division Chief, Les Chisholm, to comment on the staff proposal.

Mr. Chisholm reported that the current staff proposal is the same as the emergency regulations adopted by PERB at the end of last year. He stated that prior to January 1, 2012, the MMBA did not provide for mandatory impasse procedures. Assembly Bill 646, enacted last year and effective January 1, 2012, provides for factfinding before an employer can impose its last, best and final offer.

Mr. Chisholm provided detail regarding the proposed regulatory package. New Regulation Section 32802 would define the process and the timelines for filing a request for factfinding under the MMBA. Section 32804 would state the process and timeline with respect to factfinding requests that are deemed to be sufficient under Section 32802. Specifically, Section 32802 provides that a request for factfinding can be filed either (1) within 30 days of the date impasse is declared, or (2) where there is mediation, which is voluntary under the MMBA, requests must be filed between the time period of 30 days after the appointment or selection of the mediator, but not later than 45 days. Mr. Chisholm stated that there are occasions where the parties to a case have mutually agreed to waive or extend those timelines.

Mr. Chisholm stated that to date, PERB has had 17 requests for factfinding under the emergency regulations. In most cases, the requests have been un-opposed and have proceeded forward, although PERB had dismissed a few requests as untimely. The agency recently received its first factfinding report issued under the MMBA.

Mr. Chisholm continued reporting on the regulatory package stating that staff are proposing to amend three existing regulation sections. Consistent with other statutes that PERB administers, in Section 32380, PERB staff propose to add language that would specify that determinations made under Section 32802 would not be appealable to the Board itself. Further, under the MMBA, Section 32603 describes unfair practices by a public agency, and Section 32604 defines employee organization unfair practices, and staff proposes that both be amended to include reference to the new requirement for factfinding.

Mr. Chisholm then commented on an issue that was a point of controversy when the Board considered the emergency regulatory package. Specifically, the proposed emergency regulations contained provisions stating that a request for factfinding could be filed after a declaration of impasse and where there had not been mediation. As mentioned in the legislative report there is pending legislation which addresses this issue, Assembly Bill 1606. Assembly Bill 1606 would amend Section 3505.4 to incorporate language that is found in the existing emergency regulations to provide that a request for factfinding may be filed between 30 and 45 days after the appointment of a mediator. The author and sponsors of this legislation contend that the amendment proposed by Assembly Bill 1606 is technical and clarifies existing

law. PERB staff, stated Mr. Chisholm, advocated for the emergency regulations, with the provisions for factfinding even where there has not been mediation, as consistent with the reading of Assembly Bill 646 in its entirety and all of the provisions enacted by that legislation. He stated that PERB staff found support in Assembly Bill 1606 for its position even though it is not yet law.

Mr. Chisholm concluded by stating that no written comments to the proposed regulatory package had been received in response to the Notice of Proposed Rulemaking that is before the Board today for consideration. For the reasons offered for the emergency regulatory package, including information provided to the Office of Administrative Law in its review of those regulations, PERB staff urged the Board to adopt the proposed regulations in their current form, which are identical to emergency regulations that are currently in effect.

Chair Martinez invited members of the public to appear before the Board for comment regarding the regulatory package proposed by PERB staff.

Michael Seville, Representative, International Federation of Professional Technical Engineers, Local 21 (IFPTE), appeared before the Board. Mr. Seville stated that IFPTE is a union located in the Bay Area which represents approximately 10,000 civil servants in the city and county, utility and transit districts. Mr. Seville first expressed appreciation for the Board's consideration of this matter, but had questions and concerns regarding the timelines. Specifically, in conferring with colleagues in the Bay Area, Mr. Seville stated the belief that while it was felt the 30-day requirement was "a good move", the 45-day requirement, the back-end date to file, was restrictive. The time limits as currently proposed, said Mr. Seville "may not be enough time and it puts a mediator in a bad place and kind of hamstrings the mediator in dealing with two parties who are engaging in good faith mediation if one party moves for factfinding. It erodes the confidence of both parties of good faith mediation, or could." On behalf of the union, Mr. Seville urged the Board that either (1) Assembly Bill 1606 would go into effect to clarify the time limits and would set a legal precedent, or in Assembly Bill 1606's absence (2) requests that PERB extend the 45-day time limit for filing a request for factfinding.

Mr. Seville brought a second point to the Board's attention regarding the timelines for the public release of information and the amount of time the employer must wait prior to imposition.

Extensive discussion was held regarding Mr. Seville's questions and concerns, where scenarios were introduced under which the time limit to file a request for factfinding might or might not affect parties engaged in good faith mediation, including the parties' mutual agreement to put the request for factfinding in abeyance. Also, Mr. Chisholm noted that regarding Mr. Seville's second point, the statute already addresses this issue, and that neither the current proposed regulations nor the emergency regulations adopted by the Board addressed this topic.

Eraina Ortega, Representative, California State Association of Counties (CSAC), appeared before the Board. Ms. Ortega commented on the above-mentioned issue on behalf of CSAC and employers who attended the regional meetings held by PERB last year regarding the emergency regulations which were adopted. At the regional meetings, she stated as a key issue the employers' interest in setting an outside date to request factfinding because of their desire to be able to resolve the issue. Ms. Ortega encouraged the Board to maintain the time limits in

the regulations. As another point, she then commented that CSAC had worked with the sponsors of Assembly Bill 1606, currently all of the major statewide union representatives, to amend the bill to reflect the language of the PERB regulations, which would ensure there would be no concerns about the regulation versus the statute, and provide clarity regarding the timeframe for filing a request for factfinding. Ms. Ortega asked that if any further discussions were to be considered regarding these timeframes, that PERB work with those involved with the legislation so that it continues to reflect a common goal.

Jeffrey Edwards, Attorney, Mastagni, Holstedt, Amick, Miller & Johnsen, appeared before the Board. Following the discussion held today, Mr. Edwards asked about PERB's practice with regard to factfinding requests that have been put into abeyance. He wanted to know whether either party could take the request out of abeyance or whether such request had to be made by mutual consent.

Mr. Chisholm stated that generally, and with a limited sample with regard to factfinding under the MMBA, parties in an unfair practice proceeding that has been put into abeyance are invited individually to request that a case be taken out of abeyance. Typically, cases are taken out of abeyance when the parties have reached resolution of the matter and the request is being withdrawn. There are no specific regulations which address the matter regarding placing cases into or out of abeyance.

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin to close the public hearing on proposed rulemaking concerning factfinding procedures under the Meyers-Milias-Brown Act.

Ayes: Martinez, Dowdin Calvillo and Huguenin.

Motion Adopted – 3 to 0.

Old Business

Chair Martinez closed the public hearing and no further public comments regarding the proposed regulatory package would hereafter be taken. The Board considered the adoption and amendment of regulations (California Code of Regulations, title 8, amending Sections 32380, 32603 and 32604 and adding Sections 32802 and 32804) as included in the Notice of Proposed Rulemaking published in the April 27, 2012, California Regulatory Notice Register.

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin to forward the rulemaking package to the Office of Administrative Law for review and approval.

Ayes: Martinez, Dowdin Calvillo and Huguenin.

Motion Adopted – 3 to 0.

New Business

Chair Martinez announced that PERB has scheduled an Advisory Committee Meeting for Thursday, June 28, at 10 am in Sacramento. The following were noted as items that would be on the agenda for topics of discussion at that meeting:

1. The transfer to State Mediation and Conciliation Service into PERB.
2. An additional regulatory package which would soon be available on PERB's website.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through August 9, 2012 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo to recess the meeting to continuous closed session.

Ayes: Martinez, Dowdin Calvillo and Huguenin.

Motion Adopted – 3 to 0.

Respectfully submitted,

Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

Anita I. Martinez, Chair